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COMMENTS

on

OIL SPILL FINANCIAL RESPONSIBILITY FOR OFFSHORE FACILITIES

under

THE OIL POLLUTION ACT OF 1990,
AS AMENDED BY THE COAST GUARD AUTHORIZATION ACT OF 1996

submitted to the

MINERALS MANAGEMENT SERVICE
U.S. DEPARTMENT OF THE INTERIOR

30 CFR Part 253
RIN 1010-AC33

Washington, D.C.

August 21, 1997

The Independent Fuel Terminal Operators Association ("IFTOA")[1/] hereby submits comments in response to the Minerals Management Service ("MMS") Notice of Proposed Rulemaking on requirements for demonstrating oil spill financial responsibility for clean-up and damages resulting from oil discharges by offshore facilities due to oil exploration, production, and associated transportation.[2/] IFTOA commends MMS for correctly narrowing the scope of these requirements to those facilities and their appurtenances that are related to oil exploration and production. This proposal implements the original intent of the Oil Pollution Act of 1990 ("OPA 90"). It excludes from coverage refineries, marinas, and petroleum terminals -- all structures that are traditionally considered "onshore facilities."

I. Background

A. Union Oil Case and OPA 90

In August 1993, the MMS issued an Advanced Notice of Proposed Rulemaking to assist with the implementation of the

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1/ IFTOA is an association of companies that own or control land-based oil terminals located along the East Coast from Maine to Florida capable of receiving ocean-going vessels. Members are primarily marketers of home heating oil, gasoline and residual fuel oils on both the wholesale and retail levels. They are an essential component of the petroleum product distribution system upon which East Coast retail marketers and consumers depend for supplies.

2/ See 57 Fed. Reg. 14052 (March 25, 1997).

offshore facility financial responsibility provision of OPA 90. MMS interpreted that provision very broadly and proposed to make the rule applicable to refineries, terminals and marinas if docks or piping were located in, on or under the navigable waters of the United States. IFTOA submitted written comments and met with officials from both MMS and the Office of the Solicitor of the Department of the Interior. The Association explained that such a broad interpretation was not consistent with either the statutory language or the legislative history.

Specifically, the conference report that accompanied OPA 90 relied on the definitions of "onshore" and "offshore" facilities as they appeared and had been interpreted under the Federal Water Pollution Control Act ("FWPCA"). Moreover, the report states that to the extent that docks, piping, wharves, piers and other similar appurtenances that rest on submerged land and that are directly or indirectly connected to a land-based terminal are considered to be part of the onshore facility under the FWPCA, they are so deemed under OPA 90.[3/]

In Union Petroleum Corp. v. United States, 651 F.2d 734 (Ct. Cl. 1981), the United States Court of Claims held that an onshore facility, as defined under the FWPCA, encompassed the plaintiff's entire oil terminal and distribution facility,

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3/ See H.R. Conference Rep. 101-653, 101st Cong., 2d Sess. 779-80 (1990).

including the pipeline that ran to the pier. The Court explained that the FWPCA broadly defines an "onshore facility":

> There is no doubt that under this definition the Union terminal, consisting in part of a transportation facility which includes loading racks for trucks and railroad tank cars, and a dock extending into Chelsea Creek for oil tankers, is an 'onshore facility.'

Id. at 742. Because the pipeline's terminus was onshore and attached to Union Oil's tank farm for storage of oil, it was properly considered part of the onshore facility.

The case stands for the proposition that the various components of a shore-based facility should not be segmented, simply because the pipeline portion passes over navigable waters to reach a dock. Thus, a dock or connecting piping are appurtenances to the shore from which they originate. When Congress adopted the terms "onshore" and "offshore" facilities as part of OPA 90, Congressional leadership and other key Members and their staffs were very much aware of the Union Oil case and its interpretation and intended its adoption.

B. Coast Guard Authorization Act

However, when Congress adopted the Coast Guard Authorization Act of 1996 (P.L. 104-324) to address other provisions of OPA 90, Congressional leadership decided that it would also clarify the offshore financial responsibility measure. Thus, the Coast Guard Authorization Act states that the offshore facility financial

responsibility provision applies to facilities and their appurtenances that are involved with or relate to oil exploration and production. It provides that a responsible party with respect to an offshore facility that:

> (i)(I) is located seaward of the line of ordinary low water along that portion of the coast that is in direct contact with the open sea and the line marking the seaward limit of inland waters; or
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> (II) is located in coastal inland waters, such as bays or estuaries, seaward of the line of ordinary low water along that portion of the coast that is not in direct contact with the open sea;
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> (ii) is used for exploring for, drilling for, producing, or transporting oil from facilities engaged in oil exploration, drilling, or production; and
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> (iii) has a worst-case oil spill discharge potential of more than 1,000 barrels of oil (or a lesser amount if the President determines that the risks posed by such facility justify it), shall establish and maintain evidence of financial responsibility. . . .

Coast Guard Authorization Act, Section 1125 (P.L. 104-324). Emphasis added.

In addition, in explaining the provision and the conference report that accompanied it, Senator John Chafee (R-RI), Chairman of the Senate Committee on the Environment, a key sponsor of the OPA 90 provisions in the Coast Guard bill and an original sponsor of OPA 90, stated:

> The conference report brings the amount of financial responsibility required of offshore facilities under OPA more into line with common sense and the original intent of Congress. It will allow us to avoid imposing undue and unintended economic burdens while also ensuring that the interests of the

> environment and the parties financially injured by a spill will continue to be protected.
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> The conference report does three things in this regard.
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> First, it corrects an unjustifiably broad interpretation of OPA by the Department of the Interior. That interpretation would apply the financial responsibility requirements for offshore facilities to traditional onshore facilities like land-based oil terminals and marinas.
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> We have many such onshore facilities in my State of Rhode Island and throughout the country. The never were intended to be subject to OPA's financial responsibility requirements for offshore facilities, even if they have certain appurtenances that extend onto submerged land. The report serves to make our original intent unmistakably clear.

142 Cong. Rec. S11796 (daily ed. Sept. 28, 1996) (Statement of Sen. Chafee).

Congressman Bud Shuster (R-PA), Chairman of the House Committee on Transportation and Infrastructure, also explained that the provision did not apply to refineries, marinas and terminals because those facilities were traditional land-based, onshore facilities, stating that:

> The amendments to section 1016(c)(1) of the Oil Pollution Act of 1990 (OPA 990) contained in section 1125 of the Conference substitute will allow the Minerals Management Service to implement the financial responsibility requirements of OPA 90 for offshore facilities in a reasonable manner. The Minerals Management Service has been unable to implement the offshore facility responsibility requirements under OPA 90 because of the potentially devastating impact on my types of small businesses resulting from the original OPA 90 language. This is because the original language of section 1016 of OPA 90 could be interpreted to (1) include facilities such as onshore refineries, marinas, and even fuel storage facilities located in wetlands as "offshore facilities"; (2) include all

> navigable waters of the United States; (3) require $150 million in financial responsibility from each offshore facility despite its oil spill risk; and (4) require financial responsibility certification for facilities that handle even minimum volumes of oil.
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> The Conference substitute clarifies the original intent of the Congress by ensuring that the financial obligations imposed by section 1016(c)(1) apply solely to "traditional" offshore oil facilities located seaward of the line of ordinary low water. The provision makes clear that "offshore facilities" do not include traditional land-based facilities. Marinas, refineries, and terminals are "onshore facilities" even though docks, piping, wharfs, piers, and other similar appurtenances, connected directly or indirectly to those facilities, may sit on submerged land seaward of the line of ordinary low water. All of the components of those facilities are part of the onshore facility.

142 Cong. Rec. E1907 (daily ed. Oct. 2, 1996) (Statement of Cong. Shuster).

II. MMS Proposal

MMS properly interprets the intent of the statute, and the preamble accompanying the rulemaking speaks repeatedly in terms of exploration and production facilities or facilities and their components that are related to oil production. Moreover, the correction to the proposed rule published by MMS on April 2, 1997 (62 Fed. Reg. 15639) clearly states:

> MMS published a proposed rule on March 25, 1997 (62 FR 14052), which addressed new requirements for demonstrating oil spill financial responsibility for cleanup and damages from oil discharges from oil exploration and production facilities and associated pipelines.

In addition, in the administrative section of the preamble, MMS discusses its compliance with Executive Order 12886 and the Regulatory Flexibility Act. With regard to the Executive Order, MMS states that all the companies currently operating on the Outer Continental Shelf already comply with existing financial responsibility requirements, and of the estimated 20 oil and gas companies in State coastal waters that would be affected by the propose rule, all but three hold, have applied for or have held a Certificate of Financial Responsibility. This statement also makes it clear that MMS recognizes that refineries, marinas and terminals are not covered by the rule. MMS makes similar limiting statements about affected small businesses.

Moreover, proposed section 253.3 of the rule defines a "covered offshore facility" ("COF") as:

> (1) Including any structure, group of structures (including wells), mobile offshore drilling unit, equipment, pipeline or device (other than a vessel or other than a pipeline or deep water port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)) used for exploring for, drilling for, or producing oil (including storing, handling, transferring or processing oil associated with such production activities) or used for transporting oil from such facilities. . . ;
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> (2) That is located in the area along the coast affected by the tides. . . ; and
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> (3) That has a worst case oil-spill discharge potential of more than 1,000 barrels of oil. . . .

Emphasis added. This definition is consistent with the Coast Guard Authorization Act, excluding refineries, marinas and terminals from coverage.

However, proposed section 253.10, in addressing applicability of the rule, discusses in subparagraph (b) "a pipeline flowing landward across the line of ordinary low water." From reading the proposed rule in its entirety and the preamble to the correction to the rule, it is obvious that the pipeline referred to in (b) must be a pipeline connected to a COF -- a facility engaged in exploration and production. However, some small confusion could arise at some future time because the COF is not referenced.

III. Recommendations

Accordingly, the Independent Fuel Terminal Operators Association respectfully recommends that MMS:

1. State affirmatively in the preamble to the final rule that the offshore facility financial responsibility provision does not apply to refineries, marinas and petroleum terminals even if components of the facilities such as docks, wharves, piers, piping or other appurtenances connected directly or indirectly to the facility sit on submerged land seaward of the line of ordinary low water. All of the components of those facilities are parts of onshore facilities.

2. Clarify proposed section 253.10(b) regarding a "pipeline flowing landward across the line of ordinary low water"

to indicate the rule applies to a pipeline related to a covered offshore facility -- a pipeline connected with oil exploration and production.

The Independent Fuel Terminal Operators Association commends MMS for its reasonable and prudent rulemaking on financial responsibility and wishes to thank MMS for its constructive efforts during the Congressional consideration of the current statutory provision.

Thank you.